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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 594

TAKOMA PARK BANK, INC.,

Petitioner,

vs.

LEROY ABBOTT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

LEONARD J. GANSE,
JOHN W. CRAGUN,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

TAKOMA PARK BANK, INC.,

Petitioner,

vs.

LEROY ABBOTT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Takoma Park Bank, Inc., by its attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Maryland entered in the above cause on April 9, 1941.

Opinion Below.

The trial court rendered no written opinion on the merits.

The opinion of the Court of Appeals of the State of Maryland (R. 97) is not yet officially reported, but appears in 19 At. (2d) 169.

Jurisdiction.

The judgment of the Court of Appeals of the State of Maryland was entered April 9, 1941 (R. 110, 123). A motion for re-argument was timely filed, and was entertained (R. 110). It was overruled June 10, 1941 (R. 122).

Jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended.

The Federal right, privilege or immunity claimed is based on Executive Order No. 6260, promulgated August 28, 1933 (12 U. S. C. §95, note), issued by the President of the United States by virtue of the authority of the Act of October 6, 1917, as amended by section 2 of the Act of March 9, 1933, c. 1, 48 Stat. 1 (12 U. S. C. § 95a).

The Federal question was specially set up and claimed in petitioner's (defendant's) second plea to the declaration of respondent (R. 8-10). This plea was challenged by a general demurrer of respondent (R. 14), which was sustained (R. 13). The question was again raised by a requested instruction to the jury (defendant's "C" prayer), (R. 58), which was rejected (R. 61). The Federal question was preserved in the Court of Appeals of Maryland,[1] where it was recognized by that court (R. 102-3), and was passed upon in part (see below).

The Federal question involves the right of a plaintiff (respondent) to recover for the loss of Gold Certificates assertedly kept by him in a safe-deposit box of a bank (petitioner), in contravention of the Gold Hoarding Act and Executive Order. Petitioner has contended throughout this proceeding that respondent has no property right in the Gold Certificates, either legal or equitable, which a court

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[1] No assignment of errors appears in the record. Under Maryland practice the equivalent of an assignment of errors is carried in the brief on appeal, pursuant to Rule 39 of the Rules of the Court of Appeals of Maryland.

may recognize consistent with Executive Order No. 6260, *supra.*

The questions here presented have not heretofore been passed upon by this Court. Petitioner's contentions are not foreclosed by the statute and Executive Order, but to the contrary, are supported by the language thereof. Counsel have found no opinion which supports the decision below.[2] The Federal questions are therefore substantial. *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, 716-717; *Louisville & N. R. Co.* v. *Melton,* 218 U. S. 36, 49.

In the face of petitioner's contentions, the court below announced five reasons why respondent could recover.[3]

Three of the points of decision directly concern the Federal question—they involve a construction of the Gold Hoarding Act and Executive Order, and the policy to be followed in the application thereof. These points are:

(a) That it was necessary for petitioner, in denying the right of respondent to recover for Gold Certificates, affirmatively to allege and prove that respondent did not have a "license" to possess or own them.[4]

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[2] At least one opinion, that of the highest court of the State of Kansas, in *Schmidt* v. *Twin City State Bank,* 151 Kan. 667, 100 P. (2d) 652, is directly contrary to the judgment below.

[3] A sixth ground of decision is hinted at rather than ruled. In attempting to distinguish *Schmidt* v. *Twin City State Bank,* 151 Kan. 667, 100 P. (2d) 652, it is said merely that "in that case, at the conclusion of plaintiff's case, the defendant filed a motion to strike from the record all evidence concerning gold coins" (R. 103). But petitioner twice raised the Federal question—once by its second plea; and again at the close of the evidence by its "C" prayer. If the language above quoted be taken as a ground of decision in the court below, nevertheless this Court has held that failure to move to strike out evidence is not fatal to its jurisdiction, where a constitutional question was otherwise raised and preserved. *Brown* v. *Mississippi,* 297 U. S. 278, 286-287. Compare, *New York Central R. Co.* v. *New York & Pa. Co.,* 271 U. S. 124, 126-127.

[4] Thus, the question is, whether as a matter of Federal policy the holder of Gold Certificates must show the license required by Section 5 of Execu-

(b) That it was necessary for petitioner affirmatively to show that respondent had held and retained possession of the Gold Certificates with intent to violate the Gold Hoarding Act and Executive Order.[5]

(c) That petitioner, as bailee conducting a safe-deposit business, was estopped to deny the right, title and interest of respondent in the Gold Certificates.[6]

One, and perhaps two, of the points purport to rest the decision on non-Federal grounds based upon Maryland pleading and practice.[7] These points were (1) that petitioner's second plea to the declaration was insufficient as not answering the whole declaration, because there was no defense set up therein to the loss of $500 in currency (not

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tive Order No. 6260, before he may "retain any interest, legal or equitable," in them; or whether one contesting his right to hold them must establish the absence of any license. Cf. *Nortz* v. *United States*, 294 U. S. 317, 329 (where this Court said that the holder of Gold Certificates did not bring himself within any of the stated exceptions of the Gold Hoarding Act and Executive Order, and did not allege that he held a federal license). The solution of this question, and the consequent burden of proof, does not depend on state policy, but on the policy to be found in the Gold Hoarding Act and Executive Order. *Hill* v. *Smith*, 260 U. S. 592, 594.

[5] It is a Federal question whether the Gold Hoarding Act and Executive Order require such a showing of intent in a civil action of this kind; or whether the question of intent is applicable only to the penal section of the Act and Executive Order, where alone intent is mentioned. Act of October 6, 1917, as amended by Act of March 9, 1933, c. 1, § 2, 48 Stat. 1 (12 U. S. C. § 95a); Executive Order No. 6260, August 28, 1933 (12 U. S. C. § 95 note).

[6] The effect of this ruling is to permit one to recover for that as to which the Executive Order provides he shall not "retain any interest, legal or equitable." The decision below holds in substance that the question of gold hoarding may not be raised as between bailor and bailee in any case. This presents a Federal question. *Grand Rapids & I. R. Co.* v. *Osborn*, 193 U. S. 17, 27-28. The state rule of estoppel must yield to the policy of the Federal statute. *Anderson* v. *Carkins*, 135 U. S. 483, 485-486.

[7] As shown above, the Federal question was raised not once, but twice. If either occasion properly raised the question, then the jurisdiction of this Court is beyond successful challenge. The two rulings here referred to, however, purport to strike out, consecutively, petitioner's raising of the question.

Gold Certificates); (2) that petitioner's "C" prayer for instructions was properly rejected, because based on the second plea to which a demurrer had been sustained.

But it is petitioner's position that these grounds of the decision below do not rest on a fair or substantial basis, and in such circumstances are not binding or conclusive on this Court. *Ward* v. *Love County,* 253 U. S. 17, 22; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Rogers* v. *Alabama,* 192 U. S. 226, 230-231; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282-283; *New York Central R. Co.* v. *New York & Pa. Co.,* 271 U. S. 124, 126-127; *Patterson* v. *Alabama,* 294 U. S. 600, 602-607. As was said by Mr. Justice Holmes in *Davis* v. *Wechsler, supra:*

> "We are of opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward* v. *Love County,* 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* v. *Grand Lodge Knights of Pythias,* 225 U. S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. * * *"

The fact that these two grounds were not fairly taken by the court below will be apparent from the following:

1. (a) Petitioner's second plea by its terms limited its denial to the right of respondent to recover damages for

the alleged loss of Gold Certificates; and did not, as the court below said, purport to assert a defense to anything but the claim for Gold Certificates.[8]

(b) In support of its decision that the second plea was defective, the court below cites *Mitchell* v. *Sellman*, 5 Md. 376. To the contrary, that case is specific authority for the sufficiency of petitioner's second plea.[9]

(c) But even if this plea were defective in form in failing to announce by words that it was a partial defense, nevertheless, under the policy of Maryland, plainly announced in its statutes (enacted subsequent to *Mitchell* v. *Sellman*, *supra*), "any plea necessary to form a legal defense shall be

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[8] The plea expressly reads (R. 8-10):

"Second Plea.

"For that Plaintiff seeks to recover damages, and interest and profits, for an alleged failure and refusal of the defendant to produce and restore to plaintiff and for an alleged loss of, *among other things*, fifty One Thousand Dollar gold certificates, of the United States of America, but in which said plaintiff had no interest, legal or equitable. For that the said plaintiff held said gold certificates of the United States in violation of Section 5(b) of the Act of Congress of October 6, 1917, as amended by Section 2 of the Act of Congress of March 9, 1933, entitled: 'An Act to provide relief in the existing national emergency in banking and for other purposes' (48 Stat. 1), [quoting Act and Executive Order].

"And wherefore plaintiff, having no interest, legal or equitable, in or to the alleged fifty (50) One Thousand Dollar gold certificates of the United States, is not legally entitled to maintain this action to recover damages, interest and profits for the alleged loss *thereof*." (Italics added.)

[9] In *Mitchell* v. *Sellman* (*supra*), where an attack was made by an appellee on the sufficiency of a plea as to matters of substance and form, the court said (p. 384):

"• • • 'Every plea must answer the whole declaration or count; or rather all that it assumes, in the introductory part, to answer, and no more. If a plea begin as an answer to part, and is, in truth, but an answer to part; as if a defendant, in trespass for taking two sheep, plead that the plaintiff ought not to have his action as to one, because he took that one doing damage on his close, it is sufficient as far as it extends'. 1 Chitty's Pl., 523. The objections as to want of defense and prayer for judgment do not apply to this plea. • • •"

sufficient, without reference to mere form";[10] and likewise, it was not necessary "to state any formal commencement or conclusion to any • • • plea".[11] So clear is this policy of Maryland, that the Code further provides that "No special demurrer shall be allowed in any civil case".[12] Nor can a general demurrer "be allowed for a mere informal statement of a • • • defense; provided, such statement is sufficient in substance."[13] These statutory pronouncements of policy as to pleading were ignored by the court below in its attempt to place the case beyond reach of this Court.

2. Defendant's "C" prayer (R. 58) for instructions to the jury again raised the question of the right of respondent to recover for alleged loss of Gold Certificates which he held in violation of the Gold Hoarding Act and Executive Order.[14] The court below said that "The demurrer to the second plea having been sustained, the defendant's C. prayer based on the second plea was properly rejected"[15] (R. 104).

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[10] Sec. 3, Art. 75, Ann. Code, Md. (Flack, 1939). *Spencer* v. *Baltimore & O. R. Co.*, 126 Md. 194, 202; *Mitchell* v. *Wedderburn*, 68 Md. 139, 142-144. Compare *Lapp* v. *Stanton*, 116 Md. 197, 199.

[11] Sec. 5, Art. 75, Ann. Code, Md. (Flack, 1939). Cf. *Cumberland &c. R. Co.* v. *Slack*, 45 Md. 161, 178-179.

[12] Sec. 7, Art. 75, Ann. Code, Md. (Flack, 1939). Cf. *Mitchell* v. *Wedderburn*, 68 Md. 139, 143; *Gott* v. *State*, 44 Md. 319, 336-337.

[13] Sec. 8, Art. 75, Ann. Code, Md. (Flack, 1939). Cf. *State* v. *German Savings Bank*, 103 Md. 196, 202-204.

[14] This prayer was a request for a direction by the court that plaintiff could not recover for Gold Certificates held despite the prohibitions of the Federal law.

[15] This statement of the court misconstrues the prayer. The prayer referred to the second plea of defendant (petitioner) only as to "the *state of facts* alleged in the defendant's second plea". The prayer was not "based on the second plea", as said by the Court of Appeals (R. 104), nor did it refer to said plea other than for the purpose of identifying facts which had been proved in the trial.

The holding of the court below is erroneous. If it was meant that this prayer was properly rejected because not based on a plea in the record, then the ruling was wrong because the defense of gold hoarding was available to petitioner under the General-Issue plea [16] on which the case was tried. The prayer was based on the uncontradicted testimony of respondent that he had held Gold Certificates in defiance of the Gold Hoarding Act and Executive Order. Accordingly, as to these a prayer for direction was proper. On the other hand, if the ruling be intended to mean that the Gold Hoarding Act and Executive Order were not available as a defense, because the decision of the trial court on demurrer to the second plea had become the law of the case on gold hoarding, then the Federal question is squarely presented.

Questions Presented.

1. Whether one who held Gold Certificates after thirty days from August 28, 1933, retained any interest, legal or equitable, therein, so that he could maintain an action for them.

2. Whether one who held Gold Certificates after thirty days from August 28, 1933, must establish that he had a license to possess them, in order to bring himself within the exception to the Gold Hoarding laws.

3. Whether the policy of the Gold Hoarding laws imposes upon one defending a civil action, brought by a holder of Gold Certificates, the burden of showing that the holder intended to violate the statute.

4. Whether a holding that a bailee of Gold Certificates is estopped to deny that the bailor had any interest, legal

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[16] Section 28, (58), Art. 75, Ann. Code, Md.; Poe—Pleading & Practice [Md.] (Tiffany's ed.), Vol. 1, §§ 634, 635.

or equitable therein, under the Gold Hoarding laws, is consistent with the policy of those laws.

Statutes Involved.

The Act of March 9, 1933, c. 1, 48 Stat. 1, provides:

"Sec. 2. Subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. L. 411), as amended, is hereby amended to read as follows:

"(b) During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person engaged in any transaction referred to in this subdivision to furnish under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term 'person' means an individual, partnership, association, or corporation" (12 U. S. C. § 95a).

Executive Order No. 6260, promulgated August 28, 1933, pursuant to the foregoing statute, provides as follows:

* * * * * * *

"SEC. 5. Holding of gold coin, gold bullion, and gold certificates.—After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order; * * *.

* * * * * * *

"SEC. 10. Whoever willfully violates any provision of this Executive order or of any license, order, rule, or regulation issued or prescribed hereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than 10 years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both."

* * * * * * *

Statement.

On August 17, 1936, LeRoy Abbott (respondent) rented a safe-deposit box in the vault of Takoma Park Bank, Inc. (petitioner)[17] (R. 19, 99, 101). The two keys to the box were delivered to him; and he was thereupon given access to his box[18] (R. 19, 99). On that date, he assertedly put a

[17] The vault and safe-deposit boxes therein were shut off from the lobby of the bank by a grille, and admission to them was given by the attendant in charge releasing a lock on a door in the grille (R. 18-19, 31, 32, 99). For opening the deposit boxes, the bank had a guard key, which was required to be inserted and turned to prepare the lock. After its removal, the renter's key was inserted and turned to open the deposit-box door (R. 30, 31, 32, 33, 101).

[18] It is nowhere asserted or claimed that the bank, or its officers or employees, ever knew (or could know) what was placed therein.

sealed envelope containing fifty $1,000 Gold Certificates into the deposit box (R. 19, 99).

On November 30, 1937, respondent requested access to his box (R. 19-20, 29, 100). After his admission to the vault, the attendant used the guard key, and then, by use of respondent's key, the deposit box door was opened (R. 29, 30, 100, 101). The container was removed from the box; and when last seen respondent had left the vault and was proceeding toward the coupon booths (R. 30-32, 101-102). He was not accompanied by the attendant, who returned to her work (R. 30-32, 102). On that date, respondent examined the container, and the sealed envelope with its supposed contents were intact (R. 20, 100). The deposit-box door was locked shut by him before he left the bank (R. 21, 100). The attendant was not present (R. 30-31).

On December 14, 1937, respondent again requested access to the box (R. 21, 32, 100). The attendant used the guard key, and the box was opened with respondent's key. When the door was opened (with both respondent and the attendant present), the inner container and contents were gone [19] (R. 32-34, 100).

Respondent refused to disclose the contents of his box until he had conferred by telephone with his lawyer (R. 21, 41-42, 100-101). After doing so, he asserted that the deposit box had contained:

> Fifty $1,000 Gold Certificates
> Five $100 bills (not gold)
> Diamond ear ring
> Finger ring
> Some insurance papers
> Couple of old income-tax reports

[19] At the trial, upon no more than this testimony, and under a decision by the Court of Appeals of Maryland in the case of *Security Storage Co.* v. *Martin*, 144 Md. 536, 125 Atl. 449, the burden was thereupon cast upon the bank to explain the *prima facie* evidence of its negligence, thus created, in not exercising ordinary or reasonable care and diligence in the safekeeping of the contents of the box (Cf. Opinion, R. 102).

Upon the bank's denial of liability (R. 43), respondent filed this action in a Maryland State court to recover for the alleged loss of the Gold Certificates and the five $100 bills.[20]

To the declaration (as enlarged and limited by plaintiff's bill of particulars), defendant (petitioner) pleaded the General Issue. A second plea expressly denied the right of Abbott to recover for the alleged loss of the Gold Certificates upon the ground that plaintiff had no interest, legal or equitable, therein, because he held them in violation of the Gold Hoarding Act[21] and the President's Executive Order No. 6260 (12 U. S. C. § 95, note) promulgated thereunder, wherefore he could not maintain his action to recover damages, interest and profits for the alleged loss thereof (R. 8-10).

Respondent joined issue upon the first plea (R. 13, 14). He demurred generally to the second plea upon the ground "That said plea is bad in substance and insufficient in law" (R. 14). The demurrer was sustained, and the trial proceeded (R. 13).

On cross-examination,[22] respondent testified that he re-

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[20] No demand was made for the other effects claimed to have been in the box.

[21] Oct of October 6, 1917, § 5(b), as amended by Act of March 9, 1933, § 2, 48 Stat. 1, 12 U. S. C. § 95a.

[22] It will be observed that on direct examination respondent disclosed no circumstances corroborative of his claim to have owned this very substantial sum of money in Gold Certificates of large denomination. To demonstrate the improbability of respondent's claim that he had possessed such a sum of money, petitioner sought by cross-examination to develop the family and financial background of the aunt whom he claimed had handed him an envelope containing fifty $1,000 Gold Certificates, and that of another aunt, who, assertedly, had given it to her; the improbability that these ladies ever could have had such funds; and that in any event others than respondent were the natural objects of their affection and bounty (R. 23-26; compare, R. 67-73). The trial court grossly restricted petitioner's cross-examination of respondent. The rulings of the trial court approached, if they did not constitute, denial of due process of law. *Alford v. United States*, 282 U. S. 687.

ceived a sealed envelope from an aunt in 1925 or 1926, which he kept unopened until July, 1936; that in that month he opened the envelope, and discovered that it contained fifty $1,000 Gold Certificates (R. 23-26).

Upon the testimony of respondent himself, it was established that he was hoarding Gold Certificates from at least August 17, 1936, until November 30, 1937.

Petitioner contested respondent's claims, and offered testimony in denial of any negligence on its part (R. 28-55).

At the close of the evidence, petitioner requested a prayer for direction of the jury as to Gold Certificates:

"Defendant's 'C' Prayer.

> "The Court instructs the jury that the state of facts alleged in the defendant's second plea appear to have been proven by uncontradicted evidence and, therefore, this Court rules as a matter of law that the plaintiff is not entitled to recover anything on account of the alleged loss of the fifty $1,000. gold certificates" (R. 58).

This prayer was rejected (R. 58, 13).

From a verdict and judgment in favor of respondent for $50,500 (R. 13), petitioner appealed to the Court of Appeals of Maryland (R. 13, 14). That court affirmed the judgment (R. 110, 123), with a written opinion (R. 97).

Specification of Errors to be Urged.

1. The court erred in holding that respondent retained any interest in Gold Certificates, which would support an action or judgment therefor against petitioner.

2. The court erred in holding that it was necessary for petitioner to allege that respondent had no license from the Secretary of the Treasury to possess or own Gold Certificates.

3. The court erred in holding that it was necessary for petitioner to show an intent on the part of respondent to violate the Gold Hoarding Act and Executive Order.

4. The court erred in holding that petitioner could not dispute the title of respondent in Gold Certificates.

5. The court erred in holding that petitioner's second plea to the declaration was insufficient.

6. The court erred in holding that petitioner's "C" prayer was properly rejected.

7. The court erred in entering a judgment permitting respondent to recover for the loss of Gold Certificates.

Reasons for Granting the Writ.

The court below has decided a Federal question of substance not heretofore determined by this Court, and in a way which is probably not in accord with Federal policy as indicated by applicable decisions of this Court. Furthermore, a clear conflict exists between the decision below and that of the highest court of the State of Kansas in *Schmidt* v. *Twin City State Bank*, 151 Kans. 667, 100 P. (2d) 652. The question involved is of public importance.

Executive Order No. 6260 (12 U. S. C. §95, note) promulgated August 28, 1933, pursuant to the Act of October 6, 1917 (as amended by Act of March 9, 1933, c. 1, §2, 48 Stat. 1; 12 U. S. C. §95a), specifically provides that after 30 days from its date—

> "* * * *no person shall hold in his possession or retain any interest, legal or equitable, in any* gold coin, gold bullion, or *gold certificates* situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order; * * *." (Italics added.)

This Court has sustained the power of Congress, and of the President acting under its authority, to adopt the policy laid down by the Gold Hoarding Act.[23] Under a statute in *pari materia* (Gold Reserve Act of 1934, c. 6, 48 Stat. 337, §§3, 4; 31 U. S. C., §§441 *et seq.*) forfeitures of gold have been repeatedly effected.[24] Compulsory surrender of gold into the Federal Reserve System and the Treasury of the United States has been upheld.[25] The policy to be applied in this case is thus plainly shown.

In the light of this policy, Gold Certificates are in the nature of contraband, wherefore no damage could be sustained by the loss of them. This view was taken by the Supreme Court of Kansas in *Schmidt* v. *Twin City State Bank*, 151 Kans. 667, 100 P. (2d) 652.[26] In that case Schmidt claimed the loss of gold coins and currency from a safety-

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[23] *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240; *Nortz* v. *United States*, 294 U. S. 317; *Perry* v. *United States*, 294 U. S. 330.

[24] *United States* v. *71.41 Ounces Gold Filled Scrap (Claim of Baraban)*, 94 F. (2d) 17; *United States* v. *98 $20 United States Gold Coins*, 20 Fed. Supp. 354; *United States* v. *64.02 Troy Ounces, etc., Scrap Gold*, 8 Fed. Supp. 841. Compare, *Schmidt* v. *Twin City State Bank*, 151 Kans. 667, 100 P. (2d) 652.

[25] *Uebersee Finanz-Korporation, etc.*, v. *Rosen*, 83 F. (2d) 225; *Campbell* v. *Chase National Bank*, 5 Fed. Supp. 156 (Aff'd. 71 F. (2d) 669, cert. denied 293 U. S. 592.)

[26] That court quoted with approval rulings of the Kansas trial court, as follows:

"(1) That defendant's two motions to strike, being all of the written motions to strike, filed at the close of plaintiff's evidence and directed to plaintiff's evidence as to the alleged loss of the gold coins from his safety-deposit box, be and the same are each respectively hereby sustained for the reason that the title, if any, of the plaintiff and Maude Heath in and to all of said gold coins alleged to have been lost from plaintiff's safety-deposit box was extinguished in them and passed to and vested in the United States of America by virtue of the laws of the United States then in force and effect and for the further reason that under the laws of the United States then in full force and effect, neither the plaintiff or Maude Heath could have lawfully acquired title to any gold coins alleged to have been deposited in said safety-deposit box after the date of August 28, 1933.

"(2) That the defendant's demurrer as to gold coins filed at the close of the plaintiff's evidence be and the same is hereby sustained for the

deposit box which he had rented in the defendant bank. He asserted that the articles had disappeared from the safety-deposit box through the bank's negligence. The case is in direct conflict with the judgment below[27]

The opinion of the court below holding petitioner a bailee, and hence estopped to deny the title of respondent, cannot alter the Federal policy enjoined by the Gold Hoarding Act and Executive Order. *Awotin* v. *Atlas Exchg. Nat. Bank*, 295 U. S. 209, 213. Cf. *Hannay* v. *Eve*, 3 Cr. 242. The State rule of estoppel must yield to the Federal statute. *Anderson* v. *Carkins*, 135 U. S. 483, 485-486.

Whether it was necessary for petitioner to allege and prove that respondent had no license to hold Gold Certificates is likewise a question to be answered by the Federal policy. The Executive Order provides that "no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates * * * except under license therefor issued pursuant to this Executive Order; * * *." One who would bring himself within the exception must, as a matter of Federal policy, make the showing that he is embraced therein. *Nortz* v. *United States*, 294 U. S. 317, 328-329; *Hill* v. *Smith*, 260 U. S. 592, 595; *Martinez* v. *United States* (C. C. A. 5th, 1928),

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reason that the plaintiff has failed to prove any measure of damages or value of the gold coins alleged to have been lost and for the reason that the title, if any, of the plaintiff and Maude Heath in and to all of said gold coins alleged to have been lost from plaintiff's safety-deposit box was extinguished in them and passed to and vested in the United States of America by virtue of the laws of the United States then in force and effect."

[27] The Kansas case accords—and the case below conflicts—with the well-established general rule that one who is suing in respect of property which is in the nature of contraband can have no right, title or interest therein which a court will recognize. *Mullen* v. *Moseley* (1907), 13 Ida. 457, 464, 90 Pac. 986, 12 L. R. A. (N. S.) 394, 121 Am. St. Rep. 277, 13 Ann. Cas. 450; *Board of Police Commrs.* v. *Wagner* (1901), 93 Md. 182, 192-196, 48 Atl. 455; *Spalding* v. *Preston* (1848), 21 Vt. 9; *Mills Novelty Co.* v. *Dunbar* (1906), 11 Ida. 671, 83 Pac. 932; *Kite* v. *People* (1903), 32 Colo. 5, 10, 74 Pac. 886.

25 F. (2d) 302; *Albert* v. *United States* (C. C. A. 6th, 1922), 281 Fed. 511.

It is likewise as to intent. Whether the "willful intent" required by the penal provisions of the Act and Executive Order (§ 10) can be read into the section governing withdrawal of property rights (§ 5) is a question of Federal policy. Cf. *United States* v. *Balint,* 258 U. S. 250, 253; *Harmony* v. *United States,* 2 How. 210, 233-234. If, as petitioner contends, intent is no element under the civil section of the Order, the court below was wrong in holding that petitioner could not avail itself of the defense of gold hoarding because it had not pleaded that inapplicable element. The court below purported to support its decision by the case of *United States* v. *98 $20 United States Gold Coins,* 20 Fed. Supp. 354. That case did not involve the question of intent under the Gold Hearing Act and Executive Order, but arose under the forfeiture section of the Gold Reserve Act of 1934.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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